No. 13085

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

HOWARD M. COURTNEY,

Appellant,

vs.

CUSTER COUNTY BANK, a Corporation, and OLIVER T. DAVIS,

Appellees.

Brief of Appellees

Appeal from the United States District Court for the District of Idaho, Eastern Division

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STATEMENT OF FACTS

In as much as we feel that appellant's summary of the facts of the case departs in certain material particulars from the evidence adduced at the trial, we would like to present our own statement of facts.

In September or October, 1946, the Fourth of July Mining Company mortgaged certain equipment to Appellee Custer County Bank, for $6000.00 (Tr. p. 52). In May or June, 1947, Appellee Oliver T. Davis, Cashier of the bank, learned that some of the mortgaged equipment had not been paid for (Tr. p. 53-54). The loan at this time had been due for some time and efforts to collect it were unavailing.

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ing. At the receipt of the news, additional fruitless efforts were made to collect the debt. The mortgage was never foreclosed (Tr. p. 56-57).

Meanwhile, Appellant Howard M. Courtny had become interested in the Mining Company and went to Challis in September, 1927, to make a loan to it. Together with several officials of the Mining Company, he went to the bank and met Mr. Davis (Tr. p. 67-70). Davis was requested by the parties to draw a mortgage and he was also asked if the bank would act as escrow holder. Davis, on behalf of the bank, agreed to act as escrow holder for Courtney and the Mining Company and an escrow agreement, sometime after the mortgage was drafted, was drawn up and signed (Tr. p. 58). The testimony conflicted as to whether or not Davis was instructed by Courtney to include in a mortgage from the Mining Company to Courtney equipment identical with that in the mortgage from the Mining Company to the bank (Tr. p. 60, 84). Courtney stated he had seen a copy of the Bank's mortgage in Los Angeles but had never checked it against the original in the Recorder's office (Tr. p. 85). Davis prepared, at a time that the officers of the Mining Company and Courtney were present, the mortgage and a note for $10,000.00. He was asked to prepare an assignment of certain mining leases as part of the security but refused. The assignment was prepared by someone else (Tr. p. 60). This assignment was signed by Appellant Courtney.

Courtney handed to Davis, as chashier of the bank, a

check for $10,000.00 to be deposited to his, Courtney's account. The testimony conflicted as to whether Courtney then gave a check payable to the Mining Company directly to an officer of the Mining Company, who endorsed it and gave it to Davis, as cashier, to deposit to the credit of the Mining Company, or whether the check was given first to Davis to transmit to the Mining Company (Tr. p. 63, 72). The Mining Company, by its authorized officer, then delivered the check to the bank in payment of the loan (Tr. p. 66, 87). All of the business except the filing of the mortgage had been transacted before Courtney left. The escrow agreement, the note, the mortgage, and the assignment of the leases had been drawn up and signed (Tr. p. 66). Appellant Courtney stated that he knew nothing about the assignment, but at the time he was on the stand he was handed the assignment and it bore his signature and he admitted that he must have signed it as his name was in his handwriting, hence we assume it was completed before he left. (Tr. p. 99, 100, 101 and Ex. No. 6). Courtney did not ask for a copy of his mortgage at that time (Tr. p. 98).

The note became due in March, 1948, and Courtney granted an extension on it at that time (Tr. p. 94, 99). The Bank and Davis were not consulted as to the extension and to the depositing in the Bank by the Mining Company of certain stock as a consideration for such extension. Under the escrow agreement, Courtney had an option to receive share of stock in the Mining Company in lieu of money (Tr. p. 94). The stock deposited at the time the extension was

granted was additional stock in the Mining Company, and other stock than that referred to in the escrow agreement, the same being left there by the Mining Company when the extension was agreed upon by the Mining Company officials and Appellant Courtney. In August, 1948, Courtney returned to Challis and tsked for, and received, a copy of his mortgage from Davis. He stated while on the witness stand that he noticed then for the first time that the equipment mortgaged was not identical with that on the morgage which the Bank had held (Tr. p. 90). At the same time, namely after being apprized of the fact of what the mortgage contained, he accepted two certificates of stock (the additional stock) in the Mining Company of 2000 shares each (Tr. p. 95). That was part of the consideration for extending the payment date of the note eleven months (Tr. p. 95).

Courtney brought this action against Davis and the Bank to recover the $10,000.00 he had paid out, alleging that he had parted with the money as a result of a fraudulent concealment on the part of Davis and the Bank of the fact that certain equipment enumerated in the mortgage from the Mining Company to the Bank was not owned by the Mining Company.

The Trial Judge directed a verdict for the defendants, after the Plaintiff had presented his case, on the grounds that there was no evidence that the Plaintiff had been damaged, that the Plaintiff's act in accepting stock and not returning it indicated that he accepted the mortgage, that the stock constituted something of value, that there was no evidence

that the plaintiff had exhausted his security, and that there was no evidence of any actionable fraud, insofar as the Bank and Davis was concerned.

SUMMARY OF ARGUMENT

A general assignment of specifications of error is inadequate and insufficient and presents no question for review:

Northern Central Coal Co. v. Barrowman,
246 F. 906, 159 C.C.A. 178;

Miller-Crenshaw Co. v. Colorado Mill
& Elevator Co. 84 F. (2d) 930,
affirmed, 87 F (2d) 457;

Burton v. Carey,
82 F. (2d) 657;

Schmidt v. U. S.,
63 F. (2d) 390;

Jones v. Futrall,
75 F. (2d) 418.

Remedies for the redress of fraud are alternative and mutually inconsistent. One may either affirm a contract and recover damages or disaffirm and rescind it, but cannot pursue both remedies. Once he has made an election, he is estopped from predicating another course of conduct.

24 Am. Jur. p. 9—Sec. 191—Fraud
and Deceit.

The plaintiff-appellant cannot avail himself of the remedy of rescission because to recover money paid over through fraud, it is necessary to establish that the defendant has received money belonging to the plaintiff, since that is the fundamental fact upon which the right of action depends. It is not sufficient to show that the defendant has by fraud or wrong caused the plaintiff to pay money to others, or to sustain loss or damage for that is not the issue presented in such an action.

National Trust Company v. Gleason,
77 N.Y. 400, 33 Am. Rep. 632;
4 Am. Jur. p. 512—Sec. 22—Assumpsit.

Furthermore, his act in accepting further consideration in the form of stock constituted an election not to pursue the remedy of rescission.

24 Am. Jur. p. 36—Sec. 210—Fraud
and Deceit.

Therefore, we are forced to the conclusion that the plaintiff-appellant affirmed the contract and sought damages for an alleged fraud. But if this were his theory of action he failed to make out a prima facie case, because there is no evidence that the plaintiff has been damaged, because there is no evidence that the plaintiff has exhausted his security, and because the plaintiff has not proven the fact of fraud, and likewise no damage.

The trial court did not err in sustaining objections to the

testimony of witness Courtney as to the value of property omitted from his mortgage, because it was not shown that he had the requisite qualifications as an expert to testify on that point.

2 Wigmore on Evidence p. 640 2nd Ed.

The trial court did not err in sustaining objections to the testimony of witness Haygood as to the value of the property because it was not shown that he qualified as an expert. The fact that he was President of the Mining Company did not in and of itself constitute him an expert.

5 A.L.R. 1171 (Annotation)

> "It seems that the rule which permits an owner of property to testify as to its value does not include an officer of a corporation, either public or private."

There was no evidence in the case of fraud on the part of the defendants.

Escrow instructions cannot create a general agency, but create only a limited agency of the escrow holder. Consequently, his obligation towards his individual principals is quite different from that of a general agent to his principal.

Blackburn v. McCoy,
37 P. (2) 153;

Nelson v. Ashton-Jenkins Co.,
242 P. 408, 66 Utah 351.

The facts as shown by the record do not constitute a relationship of such a nature that any damages are allowable, the most that can be said was that Davis acted as a person drafting a mortgage and that thereafter and subsequent to the drafting of the mortgage an escrow was set up and that no terms of the escrow were violated.

ARGUMENT

The Court will note that after the Amended Complaint was filed, the Appellees directed certain motions thereto, and the trial Court in disposing of these motions stated thusly:

> "It is ordered that the motions be and each of them is hereby overruled without prejudice and the matters raised by the Motions will be considered by the Court upon the trial of the cause upon its merits."

The Appellees at the time of filing the motions, asserted and now assert that the Amended Complaint did not state a claim against either of the Appellees. We believe a reading of the Amended Complaint will disclose that the Appellees were correct in their assertion that no valid claim was stated against them.

An escrow agent is an agency that is strictly limited; that is an escrow agent acts as a neutral so to speak, in a transaction, holding the papers that are placed with it, and carrying out the instructions as contained in the escrow directions.

In the instant case, the company paid the escrow fees. An escrow agent is not one holding a position of trust as to one person only and not to the other, but is a person appointed by both parties for a particular purpose.

The Appellant specifies in the main three errors (Specifications of error p. 7, Appellant's Brief), namely:

(1) In holding there was no fraud;

(2) No evidence of damage and in refusing to permit witnesses Courtney and Haygood to testify;

(3) In directing a verdict for the defendant.

Appellant failed in the specifications of error as to fraud, to point out the evidence that showed fraud; in other words, the Appellant did not specify in what manner, and where the evidence was that pointed to fraud on behalf of the appellees, and as we understand it, a general statement that the Court erred in holding that there was no evidence of fraud, without particularly pointing out the respects in which the insufficiency exists, is too general and is not a substantial compliance with the requirements as laid down by this Court.

The same objection in directing a verdict lies in the specification of errors as to directing a verdict for the defendant, namely; no reasons were given in such specifications of error as to why the Court erred, hence no reviewable question is presented.

The following cases uphold the facts as expressed in the foregoing paragraphs:

General assignment that upon pleadings, evidence, and record verdict should have been for plaintiff in error is not available.

Northern Central Coal Co. v. Barrowman,
246 F. 906, 159 C.C.A. 178.

Assignment of error is insufficient which simply invites court to search record for error.

Miller-Crenshaw Co., v. Colorado Mill & Elevator Co.,

84 F. (2d) 930, affirmed 87 F. (2d) 457.

Assignments of error merely complaining of action of corporation commissioner held to present nothing for review on appeal from decree dismissing bill for appointment of receiver for savings and loan associatoin.

Burton v. Carey,
82 F. (2d) 657.

Assignments that court erred in directing verdict and in entering judgment thereon held insufficient to present question for review.

Schmidt v. U.S.,
63 F. (2d) 390.

Specifications of error challenging trial court's

"holdings," referring to reasons given in opinion for conclusion reached, presented no reviewable question.

Jones v. Futrall,
75 F. (2d) 418.

While Appellees believe that no discussion on the merits need be had as to the above referred to specifications of error, we will, however, without waiving our objections, discuss on the merits of the specifications of error.

One who has been injured by fraud has an election to accept the situation and recover damages or to repudiate the agreement and be placed in statu quo. He must elect between one or the other; he cannot do both.

37 C. J. S. p. 354—Section Fraud—Election of Remedies.

It is stated in Young v. Main, 72 F. (2) 640:

"This court has determined that, where a contract is obtained by fraud, the person defrauded has two remedies, and, as they are inconsistent, he must elect which one of the remedies sought he shall pursue. He may in effect affirm the contract and sue the party who defrauded him for his damages, or he may repudiate the contract and recover the purchase price paid. As these rights are inconsistent, he cannot do both."

The Appellant states that he has elected to pursue the

remedy of rescission, seeking to regain the $10,000 which he paid as a loan to the Mining Company. We cannot see how this action can be maintained in view of the fact that the Appellees did not receive, and did not have, at the time the action was commenced, the money which the Appellant is seeking. One must bear in mind that the Mining Company was not made a party to the instant action. As it is said in 4 American Jurisprudence, p. 512, Sec. 22—Assumpsit:

> "In order to support a count in assumpsit for money had and received it must in general appear that the defendant has actually received and has in his hands money, or something which has been received as money, belonging to the plaintiff, which it is his duty to immediately pay over. Indeed, there is authority that in order to support the count, it must appear that the identical money in the defendant's hands was previously in the plaintiff's possession or is the proceeds of property to which the plaintiff was entitled."

There is a conflict in the testimony as to whether Davis handled the check from Courtney to the Mining Company or whether it was given directly to an official of the Bank by Courtney. If it were given directly to the Mining Company, appellant obviously had no cause of action because appellees never had their hands on it. Even if the check were first handed to Davis, (and Courtney's testimony to this effect is not very convincing), Davis could not be said to have taken it for his own use or for that of the bank. He could not have derived any benefit from it. He would have

taken it solely as a conduit, to deliver it to the Mining Company. In addition, the check cannot be classified as money, or something which has been received as money. It was made out to the Mining Company as payee and obviously a third party could not cash it. To Daivs it was worthless. The giving of the check merely assisted in closing the deal. This case is analogous to that of Beardslee v. Richardson, 11 Wendell (N.Y.) 25, 25 Am. Dec. 596, in which it was held that one who received a sealed letter containing money for delivery to another and failed to deliver it was not liable in an action for money had and received where there was no evidence of his having opened the letter, as the money could not be said to be money in the defendant's hands so long as the seal remained unbroken. Or in the Court's own language:

> "If the defendant was liable upon the money counts, he was not liable as bailee, but as having received the money of the plaintiff for his own use. The evidence does not prove that fact, nor does it show that he received it otherwise than in a sealed letter. It can not be said to be money in the defendant's hands; unless he broke the seal, it could not answer the purpose of money, and there is no evidence of such act."

Furthermore, with respect to the check in issue, there was no privity of contract between Davis and Courtney out of which the alleged fraud arose. The check was from Courtney to the Mining Company; Davis had nothing to do with it. In addition, the alleged fraud did not arise out of the

check, but out of discussions concerning the mortgage.

4 Am. Jur. p. 511—Sec. 21—Assumpsit.

Furthermore, we cannot see how the appellant could accept further consideration in the form of stock in the Mining Company or at least fail to offer to return it, and still argue that he has the right of rescission. The two courses of conduct are incompatible.

And finally, this cannot be an action for rescission, because appellees were not parties to the contract which appellant is seeking to rescind. The contract by virtue of which appellant gave up a check for $10,000.00 was between Courtney and the Mining Company, not between Courtney and Davis, or Courtney and the Bank. We cannot see how one can base his action on an invalid contract and then collect for money had and received as the result of another distinct contract.

Therefore, the Appellant has no cause of action for money had and received. Nor can it be said to have affirmed the contract and be seeking damages for an alleged fraud, since he has stated that his cause of action is for rescission, he must stand by it, since he has made an election, therefore his case falls at this point. Even if this were not so, there is no evidence that the appellant has been damaged. The Trial Judge refused to permit witnesses Courtney and Haygood to testify as to the value of the machinery at the mine. He was on solid ground in excluding this evidence. Firstly, since the alleged theory of action was one of rescission, the value of the

machinery was irrelevent. Secondly, neither Courtney nor Haygood were qualified as experts to testify. Appellant's own citation bears us out on this point. The Washington case from which he quotes represents a minority view.

The Appellant in specification of errors Nos. 3 and 4, (p. 7 Appellant's Brief) predicating error owing to the fact that the Court did not permit Courtney and Haygood to testify as to the value of the property: Courtney, the Appellant, had had no experience with mine machinery; his sole experience being that of some instruments to make recordings, or phonograph records. He was not a trained miner, nor had he handled mining machinery, nor did he have the know-how of mining machinery.

Witness Haygood became president of the corporation some time prior to the transaction, but he had no part, at least as far as the records show, in purchasing the machinery; he was not a miner; he was not a dealer in mining machinery; in fact, the record is silent as to him being qualified in any particular. The Appellant takes the position as to Haygood that the fact he was president of the company, qualified him to testify. We do not understand the rule to be such.

The Appellant has cited numerous cases and we will discuss a few of them briefly.

The first case is Weber v. West Seattle Land & Improvement Co. (Washington) 63 P. (2d) 418 and in this case the Court held that it was settled at law in the State of Washington that the owner of property may testify as to

its value on the assumption that he is so familiar with the property and its uses as to know its worth. The Court cites the case of Wicklund vs. Allraum, et ux 211 Pac. Rep. 760, and in this case the court was discussing the right of an individual owner, and not an officer of the corporation, to testify as to its value or to give an estimate of its value, and the property under discussion was property in common use.

The next case is Travelers Indemnity Company v. Plymouth Box Panel Company (Circ. Ct. of Appeals, 4th Circ) 9 Fed. 218, and in this case the court held that a President of a corporate owner, who was shown to have been familiar with the particular machine in operation for several years, should be permitted to testify as to the sound value of the machine before the accident. Such was not the case in the instant matter. Haygood was anything but familiar with the property in question and there is no evidence to show that he was familiar with its use; whether it was a complete workable unit, or whether it was a piece of mining machinery that might be used or might not be used.

The next case is that of Appeal of Dubuque-Wisconsin Bridge Co., (Iowa) 25 NW (2d) 327, and in this case the Court held:—

> "Ordinarily the owner of property is deemed qualified by reason of his ownership to express an opinion as to the value of his property for purposes of determining its value for taxation, but the officer of a private corcoration which owns the property, unless he is a managing officer, is not thereby qualified

> to testify as to its value but it must be further shown that he has knowledge of such value as qualifies him in fact."

The next case is Dallas Railway & Terminal Co., v. Strickland Transportation Co. (Texas) 225 S.W. (2d) 901, and in this case the court held as follows:

> "In suit for damages to refrigerator semitrailer resulting from a collision, plaintiff's president who had been engaged in the business of common carriage of freight by motor vehicle for 27 years and who during that time became familiar with value of refrigerator trailers because his company bought and sold such trailers, although not an expert witness, was qualified to testify concerning the value of the trailer immediately before and after the collision."

The next case referred to is Hellstrom v. First Guaranty Bank, (N.D.) 209 NW 212, 45 ALR 1487, and in this case on page 1495, the matter is stated thusly:

> "The Court holds that a corporate officer is competent to testify to the value of realty belonging to the corporation where, by reason of his management of its affairs, his personal knowledge of the property, and his information as to surrounding values, he is qualified in fact."

And it appears in this case the president had for a great number of years, seven to eight years, had been in actual

controlling management of the affairs of the corporation and that he had had about 10 years experience in appraising farm lands and making real loans and had personal charge of Hellstrom's transactions and was appraiser for the Investors Mortgage Company. Hence, the rule as laid down in this case does not assist the Appellant.

The Appellant quotes from the Travelers Indemnity Company v. Plymouth Box Panel Company, Supra, and we note from the annotation that the case of Barrett v. Fournial 21 F| (2d) 298 is referred to and a reading of this case discloses that a court was passing on the right of an expert to testify as to the value of rugs, antiques, etc. and the facts were that the defendant had destroyed the property and that was the best evidence obtainable and the court stated the matter thusly:

> "To hold that under such cricumstances expert testimony as to value is incompetent would preclude proof of the damage caused by the defendant's wrongful act."

The next case referred to in the quoted section is Chicago and E. R. Co. v. Ohio City Lumber Company, 214 F. 751, and in that case the Court was passing on the right of an expert witness to testify and it appeared that the particular witness had been connected with the lumber business in various capacities for twenty years, and for four and one-half years had been Director, Secretary and Manager of the plaintiff's lumber company during which time he had sole charge of the business, made all purchases and sales, and

keeping the books, and he knew the value of lumber company stock and buildings.

The next case being Union Pacific R. Co., v. Lucus, 136 F. 374, and in this case we find the court was passing on the right of an individual owner who had personally purchased the property and who had used the property, to testify. The case referred to real estate.

Appellant refers also to the note 5 A.L.R. 1171, and a reading of the first paragraph of said annotation discloses the following:

> "It seems that the rule which permits an owner of property to testify as to its value does not include the officers of the corporation, either public or private.

In fact we find all the cases referred to in the A. L. R. annotations holding otherwise than as stated by the Appellant. One of the cases referred to in the notes is that of the Omaha Beverage Company vs. Temp Brewing Company, 171 N. W. 704 wherein it was held that the evidence was admitted on the ground that the witness had special knowledge as to the value of certain cereals which composed the beverage, hence, he was permitted to testify, not because he was president of the company, but because he had special knowledge.

One must bear in mind that the Mining Company was a stock-selling concern, perhaps promotional only, for its property, and there was no qualificatoin shown by either of the

two witnesses as to having any knowledge of the type, condition, or usability of the property in question, nor did they know whether it was a working unit, or whether it could be used for the type of ore they intended to mine, or whether other machinery must of a necessity be purchased to make it a workable unit.

In Omaha Loan & 8rust Co. v. Douglas County, 86 N. W. 936, the plaintiff corporation attempted to prove by its president the value of land alleged to be damaged by the regrading of a street. The proposed testimony was excluded on the ground that the witness had not shown himself qualified to testify as to its value, the court saying:

> "It is claimed that he should be treated as the owner of the property and presumed to know its value, because he is the president of the corportion purchasing it at the foreclosure sale. He, as the president of the company, is not the owner of property belonging to the corporation in the sense of the word when applied to the individual owner. An Officer of a coprortion may have no greater personal knowledge of the value of its property than an entire stranger. The question would depend on the nature of his duties in relation to the corporation and his means of acquiring knowledge of the value of the property inquired about. In
>
> this case there is no presumption in his favor, as in the case of an individual owning property, and nothing to show that the witness' knowledge was such as qualified him to testify as to the value because of values generally in that vicinity—The relation of the witness to

> the property does not bring him within the rule of qualification to testify to the value of the land, as the owner."

At 45 A. L. R. 1494 it is said:

> "The court (in the reported case) holds that a corporate officer is competent to testify to the value of realty belonging to the corporation, where, by reason of his management of its affairs, his personal knowledge of the property, and his information as to surrounding values, he is qualified in fact."

There was no evidence in the case to qualify Courtney as an expert, capable of estimating the value of the specialized type of equipment in issue at that particular time. Courtney knew nothing of the value of similar equipment in that area. Likewise, no showing was made as to Courtney having knowledge of what type of machinery was usable for the particular type of mining then in vogue in that mining district, the condition of the machinery, and also whether it was a complete unit and ready for use, its availability in the condition it was in, to perform the work necessary to be done in that mining district.

Likewise, Haygood was not shown to be qualified under the rules stated in the cited passages above. He testified that he was only somewhat familiar with the mining property. There was no evidence that he was qualified to give the value of such specialized equipment at that specific time, or that he was familiar with the value of similar equipment in that

area, or of the condition of the machinery. His chief qualifications seemed to be the fact that he was President of the Mining Company and, under the decisions above cited, that is not sufficient.

Consequently, the Trial Judge was correct in sustaining objections to the testimony of Courtney and Haygood. Furthermore, since no evidence of damage was adduced, if this is an action for damages, it must fail. Nor is there any evidence that the appellant foreclosed on his mortgage and exhausted his security to determine whether or not he was injured. This, it seems to us, would be necessary in an action for damages.

The appellant, in discussing the specification of error relating to fraud, refers to certain legal principles and draws certain conclusions, which conclusions, of course, we cannot agree with. In the first instance the appellant refers to the case of Fox, executor, vs. Cosgriff et al, 64 Idaho 448, 133 P. (2d) 930, and relies upon the position as taken by the Court in such case as authority for the position as taken by the appellant in its pleadings, but a reading of this case will disclose that they were dealing with an entirely different set of facts. The persons that were acting therein were a majority of the shareholders of a bank and the fraud alleged was one that they specifically participated in, and it might not be amiss to mention the fact that the action was one between a minority stockholders and the stockholders holding a majority of the stock, and it was one where the vendor sued his agent, which might, for all intents and purposes, be termed a vendee.

The next case is that of Kemmerer-Miles vs. Pollard,

15 Idaho 34, 96 P. 206, and is one for wrongful misrepresetations and breach of warranty.

Appellant appears to rely principally upon the rule announced in the case of Bardach vs. Chain Bakers, Inc., 37 N. Y. Supp. (2d) 584, and we commend a reading of this case to the Court. A reading of this case discloses that Serman was appointed escrowee and that he violated many of the terms of the escrow agreement. The Court put the matter thusly:

> "Sherman immediately resumed making unauthorized payments of the escrow money."

And then again:

> "While Sherman admitted violating the escrow agreement * * *."

In this case Sherman acted affirmatively, making many misrepresentations which he knew to be false. In other words, his false actions lead up to the making of the sale which caused papers to be placed in escrow, while in the instant action the loan had been agreed upon and the parties came into the bank for the purpose of consummating the loan. There was nothing said by Davis that caused Courtney, the appellant, to enter into negotiations for the loan, or in finally agreeing to make the loan, those things had all been agreed upon between the parties so in no manner or in nowise did Davis affirmatively do anything that caused Courtney to make a loan that he would not have otherwise made. Davis

was a mere drafter of certain papers, he owed no duty to Courtney at the time the papers were drafted and if he ever did owe any duty to Courtney it was only after the escrow had been completed, signed and the papers deposited, and then only to carry out terms of escrow. Neither Davis nor the bank violated any terms of the escrow agreement.

Appellant quotes extensively from 24 American Jurisprudence, pages 8, 9 and 25, and, as we read page 8 the principles laid down therein refer to the fraud in procuring a contract to be entered into, while the authorities referred to on page 9 refer to a choice of course or conduct, and as we read the cases referred to, discussing the correct rules to be applied by the vendor and vendee, the authorities on page 25 refer to the action of assumpsit, that is, an action on an implied contract, and in these cases the courts generally were dealing with contracts where the same were enterd into by reason of the fraud practiced, that is, where one person has been fraudulently induced to enter into a contract, and we have no quarrel with the principles laid down, but, of course, the facts in the instant case are so different than they were in the various cases discussed by the author of the work that we think the same is not in anywise applicable.

The next authority cited by appellant is that of Restatement of the Law—Trusts, page 7, sub-paragraph B, and this is dealing strictly where a person is in a fiduciary relation to another, and as we understand it such relationship does not exist in the instant action. If a fiduciary relationship existed it existed both as to the mining company and

to the appellant Courtney, and the only obligation then was to see that the terms of the escrow were carried out, there was nothing in the escrow agreement as to who was drafting the mortgage, and, as we understand it, neither Davis nor the bank violated any of the terms of the escrow agreement, and again let us repeat that Davis merely stood in the relationship of a person drafting a mortgage and if an escrowee stands in the position of fiduciary none existed at the time the mortgage was drafted.

The next authority referred to is Restatement of the Law-Torts, page 432, section 874, and we find the matter stated thusly:

> "A person standing in a fiduciary relation with another is liable to the other for harm resulting from a breach of duty imposed by such relation."

Then we find the author stating the matter this way:

> "A fiduciary relation exists between two persons when one of them is under a duty to act for or to give advice for the benefit of another upon matters within the scope of the relation * * *."

> "The local rules of procedure, the type of relation between the parties and the intricacy of the transaction involved, determine whether the beneficiary is entitled to redress at law or in equity."

We find nothing in these authorities that is applicable

to the parties in the instant case. The most that can be said of the bank was that it was an escrow holder and the terms of the escrow determined the rights of each party.

An escrow does not arise until there is an actual contract between the parties, and interest and a proper subject matter and an absolute deposit of an instrument with the depositary acting for the parties by which it passes beyond the control of the depositor to withdraw the deposit on the performance or happening of the agreed conditions of the escrow, and again, an escrow is generally defined as a conditional delivery of an instrument to a stranger to be kept by him until certain conditions are performed, and then to deliver according to the terms of the escrow.

These statements are supported by Words and Phrases, Volume 15, page 229 (Escrow) and as we understand it an escrow creates a limited agency and the holder of the escrow must comply with the terms thereof, and we submit in the instant matter that the facts as shown by the record in no wise creates a relationship that would cause the appellees to respond in damages, and we likewise submit that there was no violattion shown of any terms of any escrow.

Furthermore, there is no evidence of fraud in this case, and since fraud is its foundation and sine qua non, no matter what may be the theory of action, the appellant has failed to make out a prima facie case under any theory. There is certainly no evidence of actual fraud. Testimony as to whether or not Courtney instructed Davis to include in the mortgage from the Mining Company to Courtney the same equipment

as was in the mortgage from the Mining Company to the Bank is in conflict. A mortgage on property not owned by mortgagor is of no value, hence in instant matter a mortgage on the identical property covered by bank's mortgage would not have assisted Appellant Courtney. And then Davis may have understood that Courtney was referring to the property actually owned that was listed in the mortgage. If Davis had included in the mortgage, property not owned by the Mining Company, that would have been fraud in its purest sense.

The bank had no mortgage on the property covered by the Bassett mortgage and Courtney does not say he told Davis to include the property so mortgaged to Bassett, although he complains of that fact in his complaint. If there were no such instructions, there was no fraud. Appellant, assuming that there were such instructions, argues that, in view of the escrow agreement, a fiduciary relationship existed between the appellant and the appellees, and that the appellees had a duty to reveal any knowledge appellees may have had of the former mortgage, and that their failure to reveal constituted fraudlent concealment. It should be observed at this point that the Bardach case cited by Appellant to support his position involves an affirmative misrepresentation, rather than a concealment, and thus is not applicable. A reading of the facts of the case will reveal the extent to which it differs from the case at bar.

The fallacy in appellant's argument is that he does not realize that an escrow holder is a special type of agent ,or

fiduciary, who cannot because of his peculiar position, be bound to reveal certain information under certain circumstances. It is a limited agency. The California Court said, in the case of Blackburn v. McCoy, 37 P (2) 153:

> "There seems to be a divergence of opinion in the books as to whether the status of an escrow holder is that of an agent or trustee for the parties to the escrow. Conceding that the escrow instructions created an agency in the defendant Title Guarantee & Trust Company for the several parties to the escrow, as contended for by appellant Blackburn, it could not be a general agency for each one of the parties because their interests were conflicting. The status could only properly be classified as an agency on the theory there was a limited agency as to each party to the escrow, whereby the duties and obligations owing by the escrow holder to each would not conflict with the duties it owed to the others. The usual purpose that prompts the creation of an escrow is the desire of persons dealing at arm's length with each other to have their conflicting interests handled by one person in such a manner as to adequately protect the rights of each of the parties to the transaction. The fundamental principles underlying the obligations of a general agency would not, and could not, tolerate the operation of an escrow, such as we have here, as a general agency. If the several escrow instructions create in the escrow holder an agency, it must be one limiting the obligations of the escrow holder to each party to the escrow in accordance with the instructions given by such party. This in practice has been and is the un-

> derlying principle that has made possible the development of the escrow method of handling transactions which has become such an important factor in conveyancing and other business activities. Upon this theory, it has been given almost universal judicial sanction in this and other jurisdictions."

Thus, in the case at bar, the appellee was under a duty not to reveal any information of the prior mortgage to the appellant because, as the escrow holder, he owed to the other party to the escrow, the Mining Company, the duty not to divulge that information. Because of this prohibition, he could not be held to have fraudulently concealed the information.

Furthermore, we might argue on this point of fradulent concealment that an agent has no duty to communicate to his principal any knowledge which he has concerning the agency coming to his knowledge before entering the employment.

> Taylor v. Yorkshire Insurance Company Limited,
> 2 Ir. R. 1, Ann. Cas. 1913 E. 807.

And it has also been held that where an agent is acting in a mere ministrial capacity (as in the case at bar), there is no duty imposed on him of communicating to his principal the knowledge acquired in such capacity.

> Royle Min. Co. v. Fidelity & Casualty Co.,
> 142 S. W. 438.

It is obvious, therefore, that there is no evidence of fraud in the case at bar.

To sum up, we respectfully submit that upon the evidence adduced at the trial, the appellant failed to prove a prima facie case and that the ruling in excluding certain testimony did not constitute reversible error, and that the judgment heretofore rendered should be affirmed.

Respectfully submitted,

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